

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
MARK S. PESSO :
for Revision of a Determination or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period December 1, 1992 :
through August 31, 1993. :

DETERMINATION
DTA NOS. 813211
AND 813212

In the Matter of the Petition :
of :
VICTOR S. PESSO :
for Revision of a Determination or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period September 1, 1992 :
through August 31, 1993. :
:

Petitioner Mark S. Pessa, Two Tower City Place, New York, New York 10012, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1992 through August 31, 1993.¹ Petitioner Victor S. Pessa, 1116 50th Street, Brooklyn, New York 11290, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1992 through August 31, 1993.²

A consolidated hearing was held before Winifred M. Maloney, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on

¹Mark Pessa submitted this petition as officer of Pessa Keepsake Diamond Corner, Ltd. and Unique Boutique, Ltd.

²Victor S. Pessa submitted this petition as officer of Pessa Keepsake Diamond Corner, Ltd., J.P. Laurens - Roosevelt Field, Ltd., Mutt & Jeff Restaurant, Inc. and Unique Boutique, Ltd.

September 7, 1995 at 1:15 P.M., with all briefs to be submitted by February 5, 1996, which date began the six-month period for the issuance of this determination. Petitioners appearing by Kestenbaum & Mark (Bernard S. Mark, Esq., of counsel), submitted a brief on November 27, 1995. The Division of Taxation appearing by Steven U. Teitelbaum, Esq. (Vera R. Johnson, Esq., of counsel), submitted its letter brief on January 10, 1996. Petitioners submitted a reply brief on January 26, 1996. The record in this matter remained open to allow both parties to submit additional documentation, which both did.

ISSUES

I. Whether petitioners are liable for sales and use taxes due on behalf of various corporations as persons responsible for the collection and payment of sales tax pursuant to Tax Law §§ 1131 and 1133.³

II. Whether sales tax penalty should be abated due to reasonable cause and the absence of willful neglect.

FINDINGS OF FACT

1. During the periods in issue, the following retail jewelry stores: Pessio Keepsake Diamond Corner, Ltd. ("Pessio Keepsake"), Unique Boutique, Ltd. ("Unique"), J.P. Laurens - Roosevelt Field, Ltd. ("J.P. Laurens") and a fast food restaurant, Mutt & Jeff Restaurant, Inc. ("Mutt & Jeff") were all located in the Roosevelt Field shopping center ("Roosevelt Field").⁴

2. On August 12, 1993, the Division of Taxation ("Division") issued to petitioner Mark S. Pessio ("Mark") a Notice of Determination of sales and use taxes due (L-007770546-8) for the period December 1, 1992 through February 28, 1993, for tax due in the amount of \$30,613.55, penalty due of \$5,325.06 and interest due of \$2,136.58, for a total amount due of \$38,075.19.

On March 18, 1994, the Division issued to Mark a Notice of Determination of sales and use taxes due (L-008572112-9) for the period June 1, 1993 through August 31, 1993, for tax

³The corporations involved were: Unique Boutique, Ltd.; Pessio Keepsake Diamond Corner, Ltd.; J.P. Laurens - Roosevelt Field, Ltd.; and Mutt & Jeff Restaurant, Inc.

⁴The Roosevelt Field shopping center is located in Garden City, New York.

due in the amount of \$9,667.41, penalty due of \$1,493.94 and interest due of \$633.54, for a total amount due of \$11,794.89. On the same date, the Division also issued to Mark a Notice of Determination of sales and use taxes due (L-008572113-8) for the period March 1, 1993 through May 31, 1993, for tax due in the amount of \$5,455.09, penalty due of \$1,318.39 and interest due of \$545.79, for a total amount due of \$7,319.27.

Each of the notices stated that Mark was personally liable as an officer/responsible person of Unique under Tax Law §§ 1131(1) and 1133 for taxes determined to be due in accordance with Tax Law § 1138(a).

3. On December 20, 1993, the Division issued to Mark a Notice of Determination of sales and use taxes due (L-008330669-1) for the period June 1, 1993 through August 31, 1993, for tax due in the amount of \$8,921.88, penalty due of \$1,114.30 and interest due of \$317.03 for a total amount due of \$10,353.21.

On the same date, the Division also issued to Mark a Notice of Determination of sales and use taxes due (L-008330670-1) for the period March 1, 1993 through May 31, 1993, for tax due in the amount of \$5,518.73, penalty due of \$1,311.41 and interest due of \$394.60, for a total amount due of \$7,224.74.

Each of the notices stated that Mark was personally liable as an officer/responsible person of Pesso Keepsake under Tax Law §§ 1131(1) and 1133 for tax determined to be due in accordance with Tax Law § 1138(a).

4. Included as part of the jurisdictional documents introduced by the Division in the matter involving petitioner Mark S. Pesso were copies of six Notices of Determination (Division's Exhibit "F") issued to him as officer/responsible person of either Unique or Pesso Keepsake. Five of the notices are described in Findings of Fact "2" and "3". However, the sixth notice was another copy of Notice of Determination L-008330669-1 (see, Finding of Fact "3"). Notice of Determination (L-007770549-5), issued to Mark, as an officer/responsible person of Pesso Keepsake, of sales and use taxes due for the period December 1, 1992 through February 28, 1993, was not submitted into the record.

By letter dated July 2, 1996, Administrative Law Judge Maloney notified both parties that the Division of Tax Appeals lacked subject matter jurisdiction over that portion of Mark Pessa's petition which pertained to Notice of Determination L-007770549-5 inasmuch as that notice of determination was not part of the record. In accordance with the decision in the case of Matter of Scharff (Tax Appeals Tribunal, October 4, 1990, annulled on other grounds sub nom New York State Dept. of Taxation & Fin. v. Tax Appeals Tribunal, 151 Misc 2d 326, 573 NYS2d 140), the parties were given until July 12, 1996 to submit either a copy of the Notice of Determination or some evidence sufficient to prove both the fact and the date of mailing of the notice of determination by the Division into the record.

The Division submitted a copy of Notice of Determination L-007770549-5 into the record. This Notice of Determination, dated August 12, 1993, of sales and use taxes due for the period December 1, 1992 through February 28, 1993 for tax due in the amount of \$37,015.30, penalty due of \$6,427.16 and interest of \$2,583.00, for a total amount due of \$46,025.46, was issued to Mark and stated that he was personally liable as an officer/responsible person of Pessa Keepsake under Tax Law §§ 1131(1) and 1133 for tax determined to be due in accordance with Tax Law § 1138(a).

5. The notices issued by the Division to Mark in connection with Unique and Pessa Keepsake were based upon late and timely filed sales tax returns accompanied by only partial remittances of the sales taxes reported due on the sales tax returns.

6. On August 12, 1993, the Division issued to petitioner, Victor S. Pessa ("Victor"), a Notice of Determination of sales and use taxes due (L-007770545-9) for the period December 1, 1992 through February 28, 1993 for tax due in the amount of \$30,613.55, penalty due of \$5,325.06 and interest due of \$2,136.58, for a total amount due of \$38,075.19.

On March 18, 1994, the Division issued to Victor a Notice of Determination of sales and use taxes due (L-008572108-3) for the period June 1, 1993 through August 31, 1993, for tax due in the amount of \$9,667.41, penalty due of \$1,493.94 and interest due of \$633.54, for a total amount due of \$11,794.89.

On the same date, the Division also issued to Victor a Notice of Determination of sales and use taxes due (L-008572109-2) for the period March 1, 1993 through May 31, 1993, for tax due in the amount of \$5,455.09, penalty due of \$1,318.39 and interest due of \$545.79, for a total amount due of \$7,319.27.

Each of the notices stated that Victor was personally liable as an officer/responsible person of Unique under Tax Law §§ 1131(1) and 1133 for taxes determined to be due in accordance with Tax Law § 1138(a).

7. On August 12, 1993, the Division issued to Victor a Notice of Determination of sales and use taxes due (L-007770547-7) for the period December 1, 1992 through February 28, 1993, for tax due in the amount of \$37,015.30, penalty due of \$6,427.16 and interest due of \$2,583.00, for a total amount due of \$46,025.46.

On December 20, 1993, the Division issued to Victor a Notice of Determination of sales and use taxes due (L-008330671-9) for the period June 1, 1993 through August 31, 1993, for tax due in the amount of \$8,921.88, penalty due of \$1,114.30 and interest due of \$317.03, for a total amount due of \$10,353.21.

On the same date, the Division also issued to Victor a Notice of Determination of sales and use taxes due (L-008330672-8) for the period March 1, 1993 through May 31, 1993, for tax due in the amount of \$5,518.73, penalty due of \$1,311.41 and interest due of \$394.60, for a total amount due of \$7,224.74.

Each of the notices stated that Victor was personally liable as an officer/responsible person of Pesso Keepsake under Tax Law §§ 1131(1) and 1133 for taxes determined to be due in accordance with Tax Law § 1138(a).

8. On September 20, 1993, the Division issued to Victor a Notice of Determination of sales and use taxes due (L-007948825-9) for the period September 1, 1992 through November 30, 1992, for tax due in the amount of \$8,564.97, penalty due of \$1,625.13 and interest due of \$896.65, less payments of \$212.65, for a total amount due of \$10,874.10.

On November 29, 1993, the Division issued to Victor a Notice of Determination of sales and use taxes due (L-008282335-8) for the period March 1, 1993 through May 31, 1993, for tax due in the amount of \$3,140.66, penalty due of \$606.92 and interest due of \$186.40, for a total amount due of \$3,933.98.

Each of the notices stated that Victor was personally liable as an officer/responsible person of J.P. Laurens under Tax Law §§ 1131(1) and 1133 for taxes determined to be due in accordance with Tax Law §1138(a).

9. On December 13, 1993, the Division issued to Victor a Notice of Determination of sales and use taxes due (L-008316311-3) for the period December 1, 1992 through February 28, 1993, for tax due in the amount of \$10,088.47, penalty due of \$2,354.74 and interest due of \$883.28, less payments of \$5,691.74, for a total amount due of \$7,634.75.

This notice stated that Victor was personally liable as an officer/responsible person of Mutt & Jeff under Tax Law §§ 1131(1) and 1133 for taxes determined to be due in accordance with Tax Law § 1138(a).

10. The notices of determination issued by the Division to Victor in connection with Unique, Pessio Keepsake, J.P. Laurens and Mutt & Jeff were based upon late and timely filed sales tax returns accompanied by only partial remittances of the sales taxes reported due on the sales tax returns.

11. On March 21, 1994, the Division issued to Victor a Notice of Estimated Determination of sales and use taxes due (L-008577759-9) for the period March 1, 1993 through May 31, 1993, for estimated tax due in the amount of \$22,458.80, penalty due of \$4,379.41 and interest due of \$2,225.01, for a total amount due of \$29,063.22.

On the same date, the Division also issued to Victor a Notice of Estimated Determination (L-008577760-9) for the period June 1, 1993 through August 31, 1993, for estimated tax due in the amount of \$33,688.20, penalty due of \$5,726.98 and interest due of \$2,409.44, for a total amount due of \$41,824.62.

Each of the notices stated that Victor was personally liable as an officer/responsible person of Mutt & Jeff under Tax Law §§ 1131(1) and 1133 for taxes determined to be due in accordance with Tax Law § 1138(a). Each of the notices also stated that the tax assessed had been estimated in accordance with Tax Law § 1138 because a required tax return had not been filed by Mutt & Jeff.

12. After a conciliation conference, the conferee issued Conciliation Orders (CMS Nos. 133393; 137174; 138972; 137173; 135844; 133807; 133395; 139018; and 138971), dated July 22, 1994, sustaining the statutory notices issued to both petitioners.⁵

13. Petitioner Mark S. Pesso, as an officer of Pesso Keepsake and Unique, filed a petition dated October 4, 1994, which requested revision of the determinations of sales and use taxes for the period March 1, 1993 through August 31, 1993 in the combined amount of \$81,460.00, plus penalty and interest.⁶

Petitioner Victor S. Pesso, as officer of Pesso Keepsake, J.P. Laurens, Mutt & Jeff and Unique, filed a petition dated October 4, 1994, which requested revision of the determinations of sales and use taxes for the period September 1, 1992 through August 31, 1993 in the combined amount of \$110,419.00, plus penalty and interest.⁷

⁵The following Conciliation orders and the notices to which they refer were issued to petitioner Mark S. Pesso: CMS No. 133393 -- Notice numbers: L007770546 and L007770549; CMS No. 137174 -- Notice numbers: L008330669 and L008330670 and CMS No. 138972 -- Notice numbers L008572112 and L008572113. The following conciliation orders and the notices to which they refer were issued to petitioner Victor S. Pesso: CMS No. 137173 -- Notice numbers L008330671 and L008330672; CMS No. 135844 -- Notice numbers L008282335 and L008316311; CMS No. 133807 -- Notice number L007948825; CMS No. 133395 -- Notice numbers L007770545 and L007770547; CMS No. 139018 -- Notice numbers L008577759 and L008577760; and CMS No. 138971 -- Notice numbers L008572108 and L008572109.

⁶The petition referenced the following conciliation orders which were attached to the petition: CMS Numbers: 133933, 137174, and 138972.

⁷The petition referenced the following conciliation orders which were attached to the petition: CMS Numbers 137173, 135844, 133807, 133395, 139018 and 138971.

Each of the petitions asserted that no sales taxes were due for the periods in issue. If sales taxes were determined to be due, each petitioner was not a responsible person and/or his failure to pay was not willful.

14. The Division, in its answer, dated December 16, 1994, filed in the matter of the petition of Mark S. Pesso stated inter alia that it correctly determined that petitioner Mark S. Pesso was a responsible officer of each of the following corporations, to wit, Unique and Pesso Keepsake, as he is a person required to collect tax within the meaning and intent of Tax Law § 1131(1). Therefore, since Mark is a person under a duty to act for the two corporations mentioned above, he "is personally liable for the tax asserted in the Notices at issue."

In its answer, dated December 16, 1996, filed in the matter of the petition of Victor S. Pesso, the Division stated inter alia that it correctly determined that petitioner Victor S. Pesso is a responsible officer of each of the following corporations: Pesso Keepsake; Unique; J.P. Laurens and Mutt & Jeff, as he is a person required to collect tax within the meaning and intent of Tax Law § 1131(1). Therefore, since Victor is a person under a duty to act for the four corporations mentioned above, he "is personally liable for the tax asserted in the Notices at issue."

15. Mark and Victor's father is Jack Pesso ("Mr. Pesso"). During the periods in issue, Mr. Pesso was president of the following corporate entities, among others: Unique; Pesso Keepsake; J.P. Laurens and Mutt & Jeff.

16. Mr. Pesso has conceded liability as a responsible officer of: Unique, Pesso Keepsake, J.P. Laurens and Mutt & Jeff for sales and use taxes for the periods in issue. The Division's Exhibit "H" is the Notice of Withdrawal of Petition and Discontinuance of Proceeding in the matter of the petition of Jack Pesso, Officer of Pesso Keepsake Diamond Corner, Ltd., J.P. Laurens - Roosevelt Field, Ltd., Unique Boutique, Ltd., and Mutt & Jeff Rest., Inc., for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 for the periods September 1, 1992 through August 31, 1993 executed by Mr. Pesso's representative, Bernard S. Mark, on September 7, 1995.

17. Both Mark and Victor were vice presidents of the following corporations: Unique; PESSO Keepsake; and J.P. Laurens. Victor was also vice president of Mutt & Jeff. The record is silent as to when Mark and Victor became officers of the various corporations.

18. As noted above, Unique, PESSO Keepsake, J.P. Laurens and Mutt & Jeff were all located in the Roosevelt Field mall.

Also located in Roosevelt Field was a central buying office⁸ consisting of an office complex "of a few thousand square feet" which included inter alia: Mr. PESSO's, Mark's and Victor's respective offices, a private conference area, the bookkeepers' department and the central inventory department (tr., p. 119). Approximately 20 to 25 people were located in that office complex. According to Mr. PESSO, the bookkeeping department employed four individuals and Susan Findlay was employed as the "office controller" (tr., p. 41).

19. At some point in 1987, the landlord of Roosevelt Field, due to anticipated construction and renovation at the mall, relocated four of the PESSO stores.⁹ At that time, Mr. PESSO asked Mark to assist him in the renovation of the four stores. Mark agreed, coming on board at first to renovate the stores and later to manage Unique.

20. At some point in late 1987, Mr. PESSO asked Victor to come on board and to help out. Victor described his role at the beginning as being oriented towards getting "a feel for the overall business" (tr., p. 106). After an initial period of time, Victor began buying merchandise for the stores.

21. Both Mark and Victor received the same amount as their respective weekly salary. Mark's salary of \$500.00 per week was paid by Unique, while Victor's \$500.00 per week salary was paid by PESSO Keepsake.

22. Mr. PESSO proffered the following explanation of how he generally ran the various businesses:

⁸J.P. Enterprises was the umbrella company used as a mailing address for all of the entities.

⁹It is unclear which stores were relocated.

"I ran it -- there was no formal way of running it. I wasn't used to that type of an operation other than I would meet with my sons in the morning, possibly another store manager, and just tell them what I wanted done for the day. And the overall picture was pretty much a gut operation" (tr., p.40).

23. Mr. Pessa, Mark and Victor would meet in the morning in the central offices to discuss the operations of the various corporate entities.

24. Mark was the general manager of Unique. He was responsible for the daily operations of that store. He also sold jewelry on the floor. The managers of Pessa Keepsake and J.P. Laurens spoke with Mark if there were problems. Mark kept Mr. Pessa abreast of all matters related to Unique, Pessa Keepsake and J.P. Laurens.

25. During the periods in issue, the bookkeepers consulted with Victor on various matters which included sales tax matters for the various corporations.

26. As of October 1, 1987, both Mark and Victor were authorized signatories on J.P. Laurens's Chemical Bank Corporation account along with Mr. Pessa and Herbert L. Chaback. Only one signature was required on that account. The account's signature card was updated on April 8, 1992, Mr. Pessa, Mark and Victor all continued to be authorized signatories; however Susan Findlay replaced Mr. Chaback as the fourth authorized signatory. Review of the updated commercial signature card reveals that "any one" signature was required (see, Division's Exhibit "K").

27. Division's Exhibit "K" included North Fork Bank's Corporate Resolution for J.P. Laurens, dated March 4, 1993, executed by Susan Findlay, as secretary, and Mr. Pessa, as president. Review of this corporate resolution reveals that only one signature of any of the following officers: president, vice presidents or secretary was required on checks or any other type of withdrawal. It also reveals that any one of the following officers: president, vice presidents, or secretary was authorized to negotiate and procure loans from the bank. In this corporate resolution, Ms. Findlay certified that, as of March 4, 1993, the following individuals were officers of J.P. Laurens: Mr. Pessa, president; Victor and Mark, vice presidents; and Susan Findlay, secretary. The signature card for Account No. 4024012579, dated March 5, 1993, was

attached to the corporate resolution. The signatures of Mr. Pessa, Mark and Victor, as well as Susan Findlay appear on this card.

28. At some point, checking accounts were opened on behalf of Unique, J.P. Laurens and Pessa Keepsake at The Chase Manhattan Bank, N.A. ("Chase"). Review of the Chase corporate resolution for Unique, executed on January 24, 1993 by Susan Findlay as secretary and Victor as vice president, reveals that only one signature of any of the following officers: president, vice president or secretary was required on checks or any other type of withdrawal. In addition, any one of the following officers: president, vice president or secretary was authorized to negotiate and procure loans from the bank. According to this corporate resolution, the following were officers of Unique as of January 24, 1993: Mr. Pessa, president; Victor and Mark, vice presidents and Susan Findlay, secretary. The Division's Exhibit "I" includes a copy of the Chase signature cards for Unique, J.P. Laurens and Pessa Keepsake's respective checking accounts. The following individuals were authorized signatories on the above-mentioned accounts: Jack V. Pessa, president; Victor and Mark, vice presidents; and Susan Findlay, secretary. Review of each signature card reveals that only one signature was required for checks and that in the case of J.P. Laurens and Pessa Keepsake only one signature was required for loans/notes. It is noted that the signature card for the J.P. Laurens checking account had "Closed" written across the card; however, the date of closure is not on the card.

29. On August 16, 1993, Susan Findlay, as secretary of Unique and Mr. Pessa, as president of Unique executed North Fork Bank's corporate resolution for Unique (Division's Exhibit "I"). Review of this corporate resolution reveals that only one signature of any of the following officers: president, vice presidents or secretary was required on checks or any other type of withdrawal. The corporate resolution also stated that any one of the following: president, vice presidents, or secretary was authorized to negotiate and procure loans from the bank. In this corporate resolution, Ms. Findlay certified that the following individuals were the officers of the corporation, as of August 16, 1993, Mr. Pessa, president, Victor and Mark, vice presidents, and Susan Findlay, secretary.

30. Included as part of the Division's Exhibit "J" is a North Fork Bank corporate resolution for Pessio Keepsake executed on August 16, 1993 by Susan Findlay, as secretary, and Mr. Pessio, as president. Review of this corporate resolution reveals that only one signature of any of the following officers: president, vice presidents or secretary was required on checks or any other type of withdrawal. Also that any one of the following: president, vice presidents, or secretary was authorized to negotiate and procure loans from the bank. In this corporate resolution, Ms. Findlay certified that as of August 16, 1993, the following individuals were officers of Pessio Keepsake: Mr. Pessio, president; Victor and Mark, vice presidents, and Susan Findlay, secretary.

31. A bookkeeper prepared and signed the sales and use tax returns filed for the various corporations.

32. During the periods in issue, Victor signed checks on behalf of all four corporations in payment of their respective sales tax liabilities.

33. Over time, the various corporations began to suffer financial difficulties. Mr. Pessio attributed the financial problems experienced by the corporations to the lengthy mall reconstruction project.

34. Both Mark and Victor would sign checks for C.O.D. deliveries of merchandise.

35. By 1993, the inventory in the jewelry stores was brought in on consignment. Victor was responsible for getting the merchandise on the consignment basis and stocking the stores.

36. On February 26, 1993, Victor executed a New York State Department of Taxation and Finance Deferred Payment Agreement ("DPA") on behalf of J.P. Laurens.

37. On February 26, 1993, Victor executed a DPA on behalf Mutt & Jeff.

38. On March 30, 1993, Victor executed a DPA on behalf of Pessio Keepsake. The itemized liabilities listed in the DPA included inter alia the new sales tax return for the period ending January 31, 1993.

39. On March 30, 1993, Victor executed a DPA on behalf of Unique. The itemized liabilities listed in the DPA included inter alia the new sales tax return for the period ending January 31, 1993.

40. At some point in 1993, Mutt & Jeff ceased operations.

41. At some point in 1993, J.P. Laurens could no longer pay its rent and the landlord took back the store location, at which point J.P. Laurens ceased operations.

42. Victor consulted with bankruptcy attorneys on behalf of the various corporations and gathered the necessary information.

43. In August 1993, Unique and Pessio Keepsake filed for Chapter 11 bankruptcy.¹⁰

44. Included as part of the Division's Exhibit "J" is a letter,¹¹ dated August 6, 1993, from Jack V. Pessio to D. Rich, a tax compliance agent with the Division, in which Mr. Pessio wrote:

"[R]egarding the various Deferred Payment Agreements that you made with Victor, I would like to offer our explanation as to why we were unable to meet the commitment set forth therein.

"During the payment period, we operated Mutt and Jeff Restaurant, whose lease had been terminated sooner than expected. We also had J.P. Laurens and Malibu Resorts, both of which ceased operations because the leases were terminated as a result of our failure to pay rent.

"Presently, we are left with two (2) stores: Unique Boutique and Pessio Jewelers. It is virtually impossible at this time for these two (2) stores to meet all of the DPA commitments in view of the above and, also, as a result of what has transpired in the past two and one-half (2 1/2) years. As you know, Roosevelt Field was under construction for well over two (2) years. During that period of time, there was virtually no business in Roosevelt Field.

"Also, with the unusual weather of this summer, a shopping center seems like the last place anybody wants to go on a weekend with temperatures prevailing in the 90 degree range. Generally speaking, in the summer with more inclement weather the stores do well on the weekends and, all things being equal, we anticipated that we would have been able to meet our DPA commitments.

"In light of the foregoing, as discussed, we propose to modify our DPA as follows:

¹⁰The exact date upon which Unique and Pessio Keepsake filed for bankruptcy protection is not part of the record.

¹¹The stationery's letterhead contained the following address: "JP Enterprises, Roosevelt Field, Garden City, New York 11530, (516)747-4200".

"1. We have paid \$10,000.00 on August 3, 1993.

"2. We will pay an additional \$20,000.00 on August 16, 1993.

"3. We will pay the balance of the tax, interest and penalties over a period of twenty-four (24) months, with penalties totaling \$30,000.00 to be paid between the 25th and 30th months.

"We believe this revised schedule will enable us to satisfy all tax liabilities [sic].

"Please advise."

45. At some point in 1993, Mark was employed by Chicken International. However, the exact duration of his employment with Chicken International is not part of the record.¹²

SUMMARY OF THE PARTIES' POSITIONS

46. Petitioners argue that the Division erred in determining that they were responsible officers of the various corporations. Both petitioners admit that they were officers of the various corporations. However, they contend that Mr. Pesso, the owner of the various corporations, was the sole responsible person who had the authority to insure that the sales taxes for the corporations were paid. They assert that they "did not have sufficient authority over the corporations to render them liable for the sales tax due for the periods in issue" (Petitioners' brief, p. 10). Furthermore, they argue that during the periods in issue, Mark "was not even an employee (let alone a shareholder) of any of the entities in issue" (Petitioners' brief, p. 10).

47. The Division contends that it properly determined that both petitioners were responsible officers of the various corporations during the periods in issue. It asserts that

"the test as to the degree of control necessary to be a responsible officer as a matter of law is whether the petitioners had or could have had sufficient authority and control over the affairs of the corporations, not whether someone else is a responsible officer" (Division's letter brief, p. 4).

The Division maintains that a corporation may have more than one responsible officer. It argues that the evidence clearly establishes that "even though as between petitioners and Jack

¹²Petitioners submitted a 1993 W-2 wage and tax statement issued by Chicken International to Mark Pesso and a document which appears to be some sort of wage withholding statement/pay stub for Mark Pesso. There is no indication on this statement/pay stub as to the earnings period covered other than the following notation across the bottom: "pd #0094, Chicken Intl. N.F. 4/27/93".

Pesso they may not have been able to make the ultimate decision on business matters", petitioners had significant authority over and participated in the business affairs of the various corporations (Division's letter brief, p.4). Therefore, petitioners were responsible officers of the various corporations for the periods in issue.

The Division also contends that penalties assessed in this matter should not be abated. It maintains that penalties were asserted on the notices of determination issued to petitioners because the sales tax returns filed for the various corporations were late and timely filed and were accompanied by only partial remittances of the sales taxes reported due on the sales tax returns. The Division argues that petitioners have set forth no theory or asserted any legal arguments as to why the penalties should be abated in these matters.

48. Petitioners, in their reply brief, assert that the documentary evidence, as well as the testimony of both Mr. Pesso and Mark clearly show that Mark was not involved in the operations of the corporations during the periods in issue. Furthermore, petitioners argue that the evidence they presented clearly shows that they, "who were not even minority shareholders, did not simply fail to act, but rather were prevented from acting by the real power of authority for the Pesso entities, i.e. Jack Pesso" (Petitioners' reply brief, p. 3). Therefore, petitioners argue that it must be concluded that they "did not have sufficient authority over the corporations to render them liable for the sales taxes due for the periods in issue" (Petitioners' reply brief, p. 3).

CONCLUSIONS OF LAW

A. Tax Law § 1133(a) states that:

"every person required to collect any tax imposed by this article shall be personally liable for the tax imposed, collected or required to be collected under this article"

B. Tax Law § 1131(1) defines a "person required to collect any tax imposed by this article [Article 28]" to include:

"any officer, director or employee of a corporation or of a dissolved corporation, any employee of a partnership or any employee of an individual proprietorship who as such officer, director or employee is under a duty to act for such corporation, partnership or individual

proprietorship in complying with any requirement of this article; and any member of a partnership."

C. It has been held that corporate office does not, per se, impose sales tax liability upon an officeholder (see, Vogel v. New York State Dept. of Taxation & Fin., 98 Misc 2d 222, 413 NYS2d 862; Chevlowe v. Koerner, 95 Misc 2d 388, 407 NYS2d 427, 430; Matter of Unger, Tax Appeals Tribunal, March 24, 1994, confirmed 214 AD2d 857, 625 NYS2d 343, lv denied 86 NY2d 705, 632 NYS2d 498). Rather, whether a person is a responsible officer must be determined based upon the particular facts of each case (see, Matter of Cohen v. State Tax Commn., 128 AD2d 1022, 513 NYS2d 564; Stacy v. State, 82 Misc 2d 181, 368 NYS2d 448; Chevlowe v. Koerner, supra, 407 NYS2d at 429; Matter of Hall, Tax Appeals Tribunal, March 22, 1990, confirmed 176 AD2d 1006, 574 NYS2d 862; Matter of Martin, Tax Appeals Tribunal, July 20, 1989, confirmed 162 AD2d 890, 558 NYS2d 239; Matter of Autex Corp., Tax Appeals Tribunal, November 23, 1988). Factors stated by the Division's regulations are: whether the person was authorized to sign the corporate tax return, was responsible for managing or maintaining the corporate books or was permitted to generally manage the corporation (20 NYCRR 526.11[b][2]).

The Tax Appeals Tribunal, in Matter of Constantino (Tax Appeals Tribunal, September 27, 1990), stated:

"[t]he question to be resolved in any particular case is whether the individual had or could have had sufficient authority and control over the affairs of the corporation to be considered a responsible officer or employee. The case law and the decisions of this Tribunal have identified a variety of factors as indicia of responsibility: the individual's status as an officer, director, or shareholder; authorization to write checks on behalf of the corporation; the individual's knowledge of and control over the financial affairs of the corporation; authorization to hire and fire employees; whether the individual signed tax returns for the corporation; the individual's economic interest in the corporation (Cohen v. State Tax Commn., supra, 513 NYS2d 564, 565; Blodnick v. State Tax Commn., 124 AD2d 437, 507 NYS2d 536, 538, appeal dismissed 69 NY2d 822, 513 NYS2d 1027; Vogel v. New York State Dept. of Taxation & Fin., supra, 413 NYS2d 862, 865; Chevlowe v. Koerner, supra, 407 NYS2d 427, 429; Matter of William D. Barton, [Tax Appeals Tribunal, July 20, 1989]; Matter of William F. Martin, supra; Matter of Autex Corp., supra)."

D. Petitioners admit that they were officers of the various corporations during the periods in issue. They also admit that they were authorized signatories on the various corporations'

checking accounts. However, they contend that they were authorized signatories on the various checking accounts as a matter of convenience to their father, Mr. Pessa, and that they never signed any checks without Mr. Pessa's prior approval and only when Mr. Pessa was unavailable. They argue that they did not have sufficient authority over the various corporations to render them liable for the sales tax due for the periods in issue. Petitioners contend that they were mere employees who received weekly compensation.

Petitioners assert that after Mark concluded the construction supervision, his principal responsibilities were as store manager for Unique. They maintain that Mark, as Unique's store manager "responded and answered directly to his father", Mr. Pessa (Petitioners' brief, p. 5). Furthermore, petitioners aver that Mark "never fired or hired individual employees, had no buying responsibility, never signed tax returns, never wrote checks, and only signed checks previously approved by Jack" (Petitioners' brief, p. 6). They also maintain that although Mark devoted some time to Pessa Keepsake, "such time was merely interacting" with Pessa Keepsake's store manager (Petitioners' brief, p. 6). In addition, petitioners assert that during the entire periods in issue -- beginning in January 1993 through August 1993, Mark left the employ of Unique, went to work for Chicken International and for months at a time was physically located in Florida attending a training program. They aver that the documentary evidence, as well as the testimony of both Mr. Pessa and Mark clearly show that Mark "no longer undertook any activities for any of the 'Pessa' enterprises, and was not paid any compensation therefrom. Rather, he was paid by Chicken International" (Petitioners' brief, p. 6).

Petitioners assert that Victor worked primarily for Pessa Keepsake and that his "principal responsibilities included purchasing jewelry, running promotions and overseeing advertisements" (Petitioners' brief, p. 6). They contend that Victor had no ultimate decision-making authority with respect to operations of the various corporations. Petitioners aver that Victor did, on occasion, sign tax returns "upon his father's specific instructions and interfaced with the tax authorities, with the assistance of Bernard Mark, Esq., to bring information to his father's attention so that deferred payment agreements could be worked out" (Petitioners' brief,

p. 6). They maintain that Victor principally acted in an advisory capacity to Mr. Pessa by gathering information needed by Mr. Pessa to make corporate decisions. However, petitioners argue that the ultimate decision-making was done solely by Mr. Pessa.

Petitioners assert that Mr. Pessa, as president and sole shareholder of the various corporations, was the sole responsible person who had the authority to insure that the sales taxes for the various corporations were paid. They argue that Mr. Pessa was solely responsible for all financial affairs of the various corporations. Petitioners maintain that he alone had authority to hire and fire individual employees; he dealt with the accountants and lawyers; he solely dealt and had guarantees with the banks; and only he could accept agreements with the taxing authorities.

E. Petitioners arguments are without merit. It is clear from the record that Mark and Victor are responsible officers of the various corporations. Both meet a significant portion of the criteria used in determining whether an individual is a responsible officer of a corporation. Mark was vice president of Unique, Pessa Keepsake, as well as J.P. Laurens and an authorized signatory on their respective corporate checking accounts. Victor was vice president of Unique, Pessa Keepsake, J.P. Laurens and Mutt & Jeff and an authorized signatory on their respective checking accounts. In fact, both Victor and Mark signed checks on behalf of the various corporations (see, Findings of Fact "32" and "34"). Although Mr. Pessa testified that only he, on behalf of the various corporations, dealt with the banks on all matters, including potential financing, the documentary evidence in the record shows that there were no restrictions on either Victor or Mark's ability to borrow funds on behalf of the various corporations (see, Findings of Fact "27", "28", "29" and "30"). The record also shows that Victor executed the Chase corporate resolution for Unique's checking account (see, Finding of Fact "28"). Victor also entered into payment agreements, on behalf of the various corporations, with the Division (see, Findings of Fact "36", "37", "38" and "39"). Both Mark and Victor had daily discussions with Mr. Pessa concerning the operations of all the corporations (see, Finding of Fact "23"). There is no evidence in the record that either Mark or Victor did not have authority to hire or

fire employees of the various corporations. While Mr. Pessa may well have been responsible for the financial affairs of the various corporations, it is clear that both Mark and Victor had the responsibilities for the daily operations of the various corporations including, inter alia, dealing with vendors to obtain merchandise to stock the stores; dealing with customers; advertising and in-store promotions. The division of responsibilities among Mark, Victor and Mr. Pessa does not establish that either Mark or Victor is not a person required to collect taxes (Matter of Kropf, Tax Appeals Tribunal, March 21, 1991; Matter of Waite, Tax Appeals Tribunal, January 12, 1995, confirmed ___ AD2d ___, 639 NYS2d 584).

Petitioners argue that Victor worked primarily for Pessa Keepsake, the corporation which paid his salary. However, the evidence in the record indicates that Victor exercised authority on behalf of all the various corporations, e.g., when he executed payment agreements with the Division (see, Findings of Fact "36", "37", "38" and "39"). There is no evidence in the record that there were any restrictions on Victor's abilities to review the books and records of the various corporations (see, Matter of Constantino, supra). In fact, the bookkeepers consulted with Victor on various matters (see, Finding of Fact "25"). Victor also consulted with and gathered information on the various corporations for the bankruptcy attorneys (see, Finding of Fact "42").

Petitioners assert that Mark had no affiliations with any of the Pessa corporate entities from January 1993 through August 1993. They contend that he was employed by Chicken International and for part of that period was attending a training program in Florida. In support of this position, petitioners presented documentary evidence, as well as the testimony of Mark and Mr. Pessa. The record does not support petitioners claims concerning Mark. While the documentary evidence submitted does prove that Mark was employed by Chicken International during 1993, it is impossible to determine the exact dates of his employment from the documents (see, Finding of Fact "45"). There are no affidavits from individuals affiliated with Chicken International which set forth the period of Mark's employment with their enterprise. I find Mark's testimony to be extremely vague as to when he was employed by Chicken

International and the dates on which he attended the training program in Florida. Mr. Pessa's testimony was also extremely vague as to the date Mark became employed by Chicken International. In addition, there is no evidence that Mark formally resigned from the various corporations. In fact, during the period in issue, Mark signed checking account signature cards and corporate resolutions for the various corporations (see, Findings of Fact "27", "28", "29" and "30"). There is also no evidence in the record that Mark's ability to review the books and records of any of the corporations, of which he was an officer, was restricted in any way (see, Matter of Constantino, supra).

Petitioners contend that Jack Pessa is the responsible officer of the various corporations, to wit: Unique, Pessa Keepsake, J.P. Laurens and Mutt & Jeff. However, more than one person can be held liable as a responsible officer of a corporation under the statute (Matter of LaPenna, Tax Appeals Tribunal, March 14, 1991; see, Matter of Blodnick v. New York State Tax Commn., 124 AD2d 437, 507 NYS2d 536). The fact that Mark and Victor failed to exercise their respective responsibilities, as officers of the various corporations, is irrelevant (Matter of Blodnick v. New York State Tax Commn., supra, 507 NYS2d at 538; Matter of LaPenna, supra).

The evidence in the record supports the conclusion that petitioner Mark Pessa had or could have had sufficient authority and control over the corporate affairs of Unique and Pessa Keepsake and therefore was under a duty to act on behalf of each of those corporations in complying with Articles 28 and 29 of the Tax Law. The evidence also supports the conclusion that petitioner Victor Pessa had or could have had sufficient authority and control over the corporate affairs of Unique, Pessa Keepsake, J.P. Laurens and Mutt & Jeff and therefore was under a duty to act on behalf of all four corporations in complying with Articles 28 and 29 of the Tax Law.

F. Tax Law § 1145(a)(1)(i) authorizes the imposition of a penalty for failure to file a return or to pay any tax under Article 28 in a timely manner. Tax Law § 1145(a)(1)(iii) allows

the Commissioner of Taxation to remit penalties and interest in excess of the minimum rate if reasonable cause has been shown.

Petitioners have advanced no arguments or evidence which would serve to support abatement of penalties herein properly imposed. Accordingly, penalties assessed are sustained.

G. The petition of Mark S. Pessa, officer of Pessa Keepsake Diamond Corner, Ltd., and Unique Boutique is hereby denied in all respects. Notices of determination (Notices numbers: L-0077770546-8; L-008572112-9; L-008572113-8; L-0083306669-1; L-008330670-1 and L-007770549-5) are sustained.

H. The petition of Victor S. Pessa, officer of Pessa Keepsake Diamond Corner, Ltd., J.P. Laurens - Roosevelt Field, Ltd., Mutt & Jeff Restaurant, Inc. and Unique Boutique, Ltd. is hereby denied in all respects. Notices of determination (Notice numbers: L-007770545-9; L-008572108-3; L-008572109-2; L-007770547-7; L-008330671-9; L-008330672-8; L-007948825-9; L-008282335-8 and L-008316311-3) are sustained and notices of estimated determination (Notice numbers: L-008577759-9 and L-008577760-9) are sustained.

DATED: Troy, New York
August 1, 1996

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE